2001

State of Utah v. Michael Don Peterson : Brief of Respondent

Utah Supreme Court

UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

MICHAEL DON PETERSON,

Defendant-Appellant.

Case No.
14720

BRIEF OF RESPONDENT

APPEAL FROM A JUDGMENT AND SENTENCE
OF THE FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, STATE OF UTAH,
THE HONORABLE GEORGE E. BALLIF, JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Michael Don Peterson, appeals from a judgment entered against him in the Fourth Judicial District Court of Utah, the Honorable George E. Ballif, presiding, following a conviction for Forcible Sexual Abuse.

DISPOSITION IN LOWER COURT

The matter was tried before the Honorable George E. Ballif, sitting with a jury. The jury returned a verdict finding the appellant guilty of Forcible Sexual Abuse, in violation of Utah Code Ann. § 76-5-404 (1953), as amended. The judgment, sentence and commitment were entered. From the action of the trial court the appellant appeals.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmation of the verdict and judgment of the lower court.

STATEMENT OF FACTS

On March 24, 1976, at approximately 9:00 p.m., Mrs. Sandy Murphy, an Orem resident, was attacked sexually as she walked home from a church meeting. A man, later identified as appellant, approached her from behind, put his hand over her mouth, pushed her to the ground and put his hand under her dress, coming in contact with her genitals, through her underwear (T.9). Mrs. Murphy screamed and struggled and the assailant ran off (T.11).

On the evening of April 7, 1976, appellant was approached by a police officer while he was out walking (T.21). The police officer asked for his identification, found that he matched the description and name of a person being sought for questioning, and asked appellant to accompany him to the police station for questioning (T.22).

In the course of the evening, appellant gave a statement admitting that he was the man who had attacked Mrs. Murphy, and that he had done it out of sexual desire (T.32,33).

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN SUSTAINING THE OBJECTION TO APPELLANT'S LINE OF QUESTIONING REGARDING REASONS FOR APPELLANT'S PRESENCE AT THE POLICE STATION.

Police stopped appellant on April 7, 1976, when he was walking in the same vicinity where Mrs. Murphy had been attacked approximately two weeks earlier (T.21). Officer Taylor asked for appellant's identification and found that he matched the name of the person being sought for this offense. Officer Taylor then asked if appellant would accompany him to the police station to answer some questions. Appellant said he would go if it would not take too long, voluntarily got in the car and went to the station with the officers (T.22). As appellant's brief correctly states, no arrest was made at this time.

During cross-examination of Officer Taylor, the appellant's counsel tried to discover information concerning another crime for which appellant was also a suspect at the time. The prosecution objected and the objection was sustained.

Respondent submits that at no time was defendant illegally arrested or detained. He went freely with the police when he was first stopped and voluntarily stayed at the station during questioning. Nothing in the transcript indicates that appellant thought he was under arrest or was being forcibly detained.

Since appellant was not arrested or forcibly detained before or during questioning, the complaint that appellant was falsely arrested is invalid and questions asked in hope of supporting that theory were immaterial. Therefore, an objection to a question relating to the other crime for which appellant was also a suspect was properly sustained.

This question of whether defendant was arrested or went by consent to the station was twice answered by the trial court, once at suppression hearing prior to the trial and once at the trial itself (T.25). The trial court had ample opportunity to review the facts and consider appellant's position in this regard. Such a well founded decision of the trial court should not be disturbed.

POINT II

THE TRIAL COURT DID NOT ERR IN ALLOWING APPELLANT'S ORAL TESTIMONY TO BE ADMITTED AS EVIDENCE AT TRIAL.

As outlined in Point I above, respondent submits that appellant was not illegally detained at the time he made his admission as to his attack on Mrs. Murphy. Appellant's rights were carefully explained to him at least three times while he was at the police station (T.27,31). He waived his right to have an attorney and said he would talk freely to the county attorney (T.31).

The police questioning was not excessive or coercive. He was asked about his whereabouts on the evening in question and his explanation of the attack on Mrs. Murphy. Contrary to appellant's allegations, the officers who were present during questioning testified they did not suggest phrases to appellant (T.37,43). The officer read a couple of sentences from the report and asked appellant if they were true only after appellant had given a full explanation of his account of the incident (T.37). Such thoroughness should not be a reason for suggesting that appellant's statment was involuntary.

The fact that appellant may have a lower intellectual ability than general adult population should not be an automatic cause for excluding his admissions either.

In State v. Ashdown, 5 Utah 2d 59, 296 P.2d 726 (1956), the defendant was suspected of murdering her husband and was taken in for questioning immediately after the funeral. After five and one half hours of questioning, she admitted to having committed the crime.

This Court described that defendant as "a person of limited education and was naturally emotionally upset at the time of questioning." But in sustaining the admission of this confession, the Court said:

> "Manifestly, the will of a person who is of tender age or of weak intellect may be more easily overcome than that of one who is more mature or more intelligent. This alone, however, will not render a confession inadmissible and if the confession was obtained in a manner and by such methods as are consistent with the proper detention of crime and determination of guilt, then our duty is to sustain the trial court." Id. at 729.

In accord: People v. Lara, 62 Cal.Rptr. 586, 432 P.2d 202 (1967) (mental subnormality of accused only one factor considered in deciding voluntariness of confession).

Even if it could be adequately proven that this lower intelligence did make appellant more persuadable than a normal adult, the facts do not suggest that those who questioned him took advantage of this factor.

A careful study of the facts will show that the factors mentioned in appellant's brief, taken individually or collectively, present no indication that the appellant was forced, or unduly persuaded, to answer questions or make his admission as to the attack on Mrs. Murphy. His presence at the station was voluntary, his rights were explained, the questioning was proper, both in form and content, his lower intellectual abilities were not preyed upon, and no means of threats or force were used. His voluntary admission was valid and was properly admitted into evidence.

The Court in State v. Ashdown, supra, spoke decisively about affirmation of trial court's findings

in such an instance:

> ". . . [A]fter the trial court has decided from the evidence that the confession was voluntarily made, the appellate court will not disturb the finding in the absence of a showing of abuse of its discretion where there is substantial evidence from which it could reasonably so find." Id. at 729.

Substantial evidence of voluntariness exists in the present case and this decision should be upheld.

POINT III

THE TRIAL COURT DID NOT ERR IN NOT GRANTING A MISTRIAL BASED UPON CROSS-EXAMINATION OF APPELLANT'S WIFE.

Appellant argues that the county attorney was guilty of misconduct by asking the appellant's wife, on cross-examination, if appellant had ever been convicted of a felony involving dishonesty. A close reading of the Utah Rules of Evidence, however, will clearly show that such questioning was permissible.

Utah Rules of Evidence, Rule 21, states:

> "Evidence of the conviction of a witness for a crime not involving dishonesty or false statement shall be inadmissible for the purpose of impairing his credibility, except as otherwise provided by statute." (Emphasis added.)

This Rule specifically excepts crimes of dishonesty and false statement from its prohibition against admission of evidence of crimes. Therefore, such evidence of crimes of dishonesty can be admitted under Rule 20, which states:

> "Subject to Rules 21 and 22, for purpose of impairing or supporting the credibility of a witness, any party including a party calling him may examine him and introduce extrinsic evidence concerning any statment or conduct by him and any other matter relevant upon the issues of credibility." (Emphasis added.)

Examining other witnesses as to their knowledge of a conviction of a certain witness for a crime of dishonesty is within the scope and purpose of this Rule. Since appellant had taken the stand prior to the cross-examination in question, he had become a witness and his credibility was susceptible to this type of attack.

Rule 26(f) of Alaska's Rules of Criminal Procedure is very similar to Rule 21 of Utah's Rules of Evidence. Rule 26(f) says that for purpose of attacking credibility of witness, evidence that the witness has been convicted of a crime is only admissible if the crime involved dishonesty or false statement. The Alaska Supreme Court acknowledged this as a valid exception to

the general rule that evidence of crimes is not admissible in Galauski v. State, 527 P.2d 450 (1974), when it stated:

> ". . .[E]vidence of convictions for crimes involving dishonesty is admissible to show that a witness' testimony is unworthy." Id. at 467.

For the same reasons, the questioning of Mrs. Peterson was permissible. Even if such questioning of Mrs. Peterson by the county attorney was somehow improper, it is totally a matter of conjecture that this one question caused the jury to be prejudiced against the appellant. Since the questioning was terminated even before an answer had been given, this questioning, if error, must be deemed harmless error since it did not have ". . . a substantial influence in bringing about the verdict or finding," and this is required if a verdict is to be set aside for reason of erroneous admission of evidence. Utah Rules of Evidence, Rule 4.

POINT IV

SUFFICIENT EVIDENCE WAS PRESENTED THAT APPELLANT TOUCHED THE PLAINTIFF'S GENITALS AND OTHERWISE TOOK INDECENT LIBERTIES AND THUS THE ELEMENTS OF THE CRIME WERE PROVEN.

Appellant suggests that since the evidence shows that there was a layer of clothing between Mrs. Murphy's genitals and appellant's hand, that he did not "touch" the genitals in the statutory sense of the word. To accept such a limited definition of the word would distort the ordinary meaning of the word and would unduly limit the legislative intent of this statute.

One can "touch" another's hand even though the other person is wearing gloves. A person can "touch" or hold an arm of another even though it is covered by a sleeve of a coat. Such is common use and understanding of the word "touch" and such usage should be applied in the present case.

The legislature did not give this word a special definition in the statute in question. The required specificity needed to properly define the purpose of the statute is supplied by the intent required in order for someone to be guilty of forcible sexual abuse. It seems evident that if one touches the genitals of another with the intent to satisfy sexual desire, even though the area he touched was

covered by the victim's underwear, he is guilty of the very thing which the legislature proscribed in this statute.

Assuming, arguendo, that this technicality does prohibit appellant's actions from being seen as "touching" of another's genitals, he has taken "indecent liberties" under any definition. The evidence presented established that appellant invaded a woman's body by forcing her to the ground and putting his hand up her dress for the satisfaction of sexual desire. Such evidence is clearly sufficient to establish that appellant was guilty of forcible sexual abuse as defined by the statute.

POINT V

THE TRIAL COURT DID NOT ERR IN NOT ADMITTING TESTIMONY REGARDING APPELLANT'S SPECIFIC BEHAVIOR.

Appellant called Barbara Batty to the stand to testify as a character witness in appellant's behalf. Appellant's counsel questioned Mrs. Batty as to appellant's behavior towards her when neither of their respective spouses were present. The prosecutor objected (T.82). After some debate on the legal issue of the admissibility of such evidence,

the Court sustained the objection (T.83-85).

Appellant cites Rule 47 of the Utah Rules of Evidence as authority for his position. However, Rule 47 is quite specific in defining what evidence will be allowed in the area of character traits. It reads in part:

> ". . . (b) in a criminal action evidence of a trait of an accused's character as tending to prove his guilt or innocence of the offense charged . . . may not be excluded by the judge . . . if offered by the accused to prove his innocence. . . ."

In order for evidence to be admissible under this Rule, it must go directly to the character trait which is in question. It is difficult to see how evidence that appellant does not make sexual advances to a woman with whom he and his wife are good friends and with whom he and his wife frequently socialize with, has any probative value of determining if he would sexually attack a strange woman on the street at night.

Any connection which this evidence may have to prove or disprove the trait in question is far too indirect to be relevant. As the note under Rule 47 states, "The admission or rejection of character evidence depends primarily on the court's conception of its relevancy." The conception of the trial court in this

case was that such evidence was too remote and therefore inadmissible.

An analogous situation existed in State v. Fairbanks, 171 P.2d 845 (1946). The defendant in that case was charged with taking indecent liberties with a female under the age of fifteen. The defendant called a witness to try and establish that the defendant was in the habit of calling upon young girls to answer telephone calls in the office. Presumably such evidence was offered to show that since the defendant had not taken indecent liberties with these girls, he did not have the character trait to take indecent liberties with the girls in question. The Washington Supreme Court flatly rejected this argument on appeal. It said:

> "We fail to perceive any materiality of the evidence indicated by the questions. If it was designed to show that appellant was a man of good character, it was incompetent." Id. at 848.

The excluded evidence in the present case was likewise incompetent and irrelevant. The trial court's well-supported decision on its exclusion should be affirmed.

CONCLUSION

For the above reasons, respondent respectfully requests that the conviction of the lower court be affirmed.

Respectfully submitted

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